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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 (SAN FRANCISCO DIVISION)

15 VALENT U.S.A. CORPORATION
16 and SUMITOMO CHEMICAL CO., LTD.,

17 Plaintiffs,

18 v.

19 SYNGENTA CROP PROTECTION, INC.,

20 Defendant.

CASE NO. 08-CV-0720 VRW

**PLAINTIFFS' REPLY IN SUPPORT
OF THEIR MOTION FOR
EXPEDITED DISCOVERY**

Hearing Date: June 26, 2008
Hearing Time: 2:30 p.m.
Courtroom: Courtroom 6, 17th floor

I. INTRODUCTION

Pursuant to the Court's Order entered May 30, 2008 and Local Rule 7-3(c), Plaintiffs Valent U.S.A. Corporation and Sumitomo Chemical Company, Ltd. ("Plaintiffs") submit this reply in support of their motion for expedited discovery. In its response to Plaintiffs' motion, Defendant Syngenta Crop Protection, Inc. ("Syngenta") asserts that Plaintiffs' motion should not be granted because jurisdiction has not yet been determined. However, as explained below, the Court already addressed Syngenta's concerns by rescheduling the hearing on Syngenta's motion to dismiss. Syngenta also asserts that Plaintiffs discovery requests are "overbroad" and "wide-ranging." But as Plaintiffs explained in their motion, their discovery requests are of very limited scope – *i.e.*, information relevant to the '469 patent's validity and are in full compliance with *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002). Syngenta also asserts that Plaintiffs would not benefit from the granting of their motion because there should be no reasonable expectation that the case will be resolved in the next six months. However, this ignores the fact that it was Syngenta's delay tactics that have placed Plaintiffs in this position in the first place. It also ignores the fact that starting discovery now would benefit not only Plaintiffs, but also the Court by potentially speeding the resolution of this case.

Syngenta has not opposed Plaintiffs' alternative proposal that the Case Management Conference be rescheduled to an earlier date so that discovery may commence sooner by operation of the Federal Rules of Civil Procedure. Granting Plaintiffs' alternative request would moot Syngenta's purported concerns about the scope of the discovery Plaintiffs have requested.

II. STATEMENT OF ISSUES TO BE DECIDED

The issue to be decided is whether Plaintiffs' motion for expedited discovery should be granted, or in the alternative, whether the Case Management Conference should be rescheduled to an earlier date so that discovery may commence sooner by operation of the Federal Rules of Civil

1 Procedure.

2 **III. STATEMENT OF FACTS**

3 As Plaintiffs explained in their motion for expedited discovery and in their opposition to
4 Syngenta's motion to dismiss the complaint, Plaintiffs would have filed the present lawsuit 15
5 months earlier than they did were it not for Syngenta's delaying the discussions of a license under
6 the '469 patent for one year, in a calculated effort to exclude Plaintiffs from selling clothianidin for
7 treatment of seeds of genetically engineered plants.
8

9 The Plaintiffs are greatly prejudiced by Syngenta's delay because the products at issue are
10 agricultural and sales are driven by relevant annual seed treating and planting seasons, coupled with
11 the promotional and developmental activities that must take place before farmers actually decide to
12 use the new products. Even just a few months of delay in discovery, and in the ultimate resolution
13 of this case, can potentially delay the introduction of Plaintiffs' products for an additional year.

14 Syngenta continued with its strategy of delay by filing an unjustified motion to dismiss the
15 complaint. As Plaintiffs explained in their opposition to that motion, not only do the facts fully
16 support jurisdiction, but virtually every legal argument Syngenta offers has been rejected by recent
17 Supreme Court and Federal Circuit decisions. Syngenta also offered virtually no relevant evidence
18 to support its motion even though it was fully aware of Plaintiffs' allegations since January 2008,
19 when Plaintiffs filed their complaint. Thus, Syngenta's motion was apparently a deliberate attempt
20 to further delay resolution of this case instead of a sincere evidence-based challenge to Plaintiffs'
21 theory of jurisdiction.
22

23 Syngenta has delayed long enough. Plaintiffs' motion for expedited discovery requests that
24 Syngenta be ordered to produce within 30 days certain limited categories of information that it
25 would normally be obligated to produce as part of its initial disclosures under FED. R. CIV. P.
26 26(a)(1)(A)(ii). Naturally, Plaintiffs would reciprocate with similar discovery.
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1 Plaintiffs relied upon this district's decision in *Semitool* as support for their motion. In its
2 response, Syngenta does not dispute that the same factors present in *Semitool* are also present in this
3 case, and thus, support granting Plaintiffs' motion. Indeed, Syngenta is silent on certain *Semitool*
4 factors, apparently realizing that it would risk losing all credibility with this Court if it were to
5 attempt to dispute the indisputable.¹

6 Syngenta also does not oppose Plaintiffs' alternative request that the Case Management
7 Conference be rescheduled to an earlier date convenient for the Court. Thus, Plaintiffs renew their
8 request that their motion for expedited discovery be granted, or in the alternative, that the Case
9 Management Conference be rescheduled to an earlier date so that discovery may commence sooner
10 by operation of the Federal Rules of Civil Procedure.

12 **IV. ARGUMENT**

14 **A. The Court Has Already Indicated that it is Deciding Syngenta's Motion to 15 Dismiss the Complaint Prior to Deciding Plaintiffs' Motion for Expedited 16 Discovery**

16 Plaintiffs were frankly surprised to see Syngenta repeatedly assert throughout its response
17 that it should not have to produce documents before its motion to dismiss is decided. *See* Syngenta
18 Response at 1, 3, 4, 5, 6, 7, 8. Syngenta is apparently confused. Although, as explained below,
19 Plaintiffs would be entitled to expedited discovery prior to Syngenta's motion being decided, that is
20 not what Plaintiffs propose at this time. By rescheduling the hearing for Syngenta's motion to
21 dismiss from August 14, 2008 to June 26, 2008 (*See* D.I. 69), and by hearing argument on both
22 Syngenta's motion to dismiss and Plaintiffs' motion for expedited discovery on the same date, this
23 Court has already indicated that it will decide Syngenta's motion to dismiss prior to potentially
24 ordering expedited discovery. Thus, most, if not all, of Syngenta's concerns with Plaintiffs' motion
25 for expedited discovery have already been addressed by the Court.

27 ¹ *See* footnote 4 *infra*.

Further, nothing prevents this Court from issuing an order for expedited discovery before it decides the motion to dismiss. *See Nielsen v. Merck & Co.*, 2007 U.S. Dist. LEXIS 21250, 2007 WL 806510 (N.D. Cal. Mar. 15, 2007); *see also Invitrogen Corp. v. President and Fellows of Harvard College*, 2007 WL 2915058 (S.D. Cal. Oct. 4, 2007).²

B. Plaintiffs' Discovery Requests are of a Limited Scope -- Not "Overbroad," or "Wide-Ranging"

In its response, Syngenta repeatedly asserts that Plaintiffs' discovery requests are "overbroad" and "wide-ranging, as they go beyond what is relevant to the motion to dismiss." *See, e.g.*, Syngenta Response at 1, 2, 5. But as noted above, Plaintiffs are seeking limited information related to the merits of the case in accordance with *Semitool*. As Plaintiffs explained in their motion for expedited discovery, they are seeking information of a limited scope as compared with what they could have sought. Specifically, Plaintiffs are requesting information that Syngenta would normally be obligated to produce as part of its initial disclosures under FED. R. CIV. P. 26(a)(1)(A)(ii) -- *i.e.*, documents relevant to the validity of the '469 patent and documents regarding other potential parties that should be joined to this lawsuit. *See* Plaintiffs' Motion at 3 and 7-8.³

In fact, Plaintiffs purposefully requested discovery of a limited scope because that was an important factor considered by this district in *Semitool* when it granted the plaintiff's motion for expedited discovery. *Semitool* at 277.⁴ Indeed, there are many other categories of documents which

² In one breath, Syngenta asserts that any expedited discovery granted prior to the Court's decision on its motion to dismiss the complaint should be limited to the issues pending in the motion to dismiss. Yet, in another breath, Syngenta acknowledges that there is no general rule requiring such limitations on expedited discovery. Syngenta Response at 2.

³ Syngenta attempts to introduce confusion where there is none by asserting that it is not required to produce documents as part of its initial disclosures, but rather, it is required only to provide a description of those documents. The Rule is clear that the producing party may choose either, but this does not mean the Court cannot order the parties to produce documents or otherwise make them available for inspection by the other party.

⁴ Notably, Syngenta does not dispute that the three categories of documents requested by Plaintiffs are relevant to the issues in the case and would be produced during the normal course of discovery. These factors were also important to the court in *Semitool*. Syngenta also does not dispute that the parties are represented by sophisticated counsel and that the parties have been involved in pre-litigation discussion for over a year; two additional factors that were important to

1 Plaintiffs desire and could have requested, but chose not to request at this time, in the interest of
 2 staying consistent with *Semitoool*. For example, Plaintiffs could have requested information
 3 regarding: i) all of Syngenta's sales of clothianidin; ii) all communications with anyone regarding
 4 clothianidin; iii) all communications with anyone regarding Plaintiffs Sumitomo and Valent. And
 5 although these and other categories of documents will be requested of Syngenta at some point,
 6 Plaintiffs' motion does not seek that broad scope of discovery.⁵

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 8 **C. Granting Expedited Discovery, Even if Only By Two Months, Will Greatly
 9 Benefit Plaintiffs and the Court**

10 As discussed above, for more than a year, Syngenta led Plaintiffs to delay filing this lawsuit.
 11 It eventually became clear that the parties' discussions would not lead to a license and that Syngenta
 12 did not want any new entrants in the business of treating seeds of genetically engineered crops with
 13 clothianidin. Once Plaintiffs did file this lawsuit requesting a declaration that the '469 patent is
 14 invalid, Syngenta filed its motion to dismiss the complaint. Thus, to date, Syngenta's actions have
 15 delayed Plaintiffs for more than 20 months. As Plaintiffs have explained, granting the motion for
 16 expedited discovery would be extremely beneficial not only to Plaintiffs, but also to the Court, since
 17 it would put the parties at least two months ahead of the current schedule for the start of discovery
 18 (*i.e.*, mid-June as opposed to the end of August), and the parties will be better prepared to try to
 19 resolve the case early, either on summary judgment or through possible settlement.

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the *Semitoool* court. *Semitoool* at 277.

22 Syngenta attempts to distinguish *Semitoool* by asserting that, unlike the defendant in *Semitoool*, Syngenta has
 23 challenged the jurisdiction of this Court. Syngenta Response at 7. But as explained above, the Court has already
 24 addressed this concern by rescheduling the hearing for Syngenta's motion to dismiss to an earlier date. Thus, the Court
 had indicated that it will decide the motion for expedited discovery once jurisdiction is decided.

25 ⁵ Curiously, Syngenta also asserts that it opposes Plaintiffs' motion because "Plaintiffs have not served any
 26 discovery requests," and "have not provided definitions and instructions with their formal requests and Syngenta has no
 27 avenue for raising appropriate objections to the requests." Syngenta Response at 8. Putting aside the fact that Plaintiffs
 28 specifically spelled out the categories of relevant documents they are seeking, and also putting aside the fact that
 Syngenta apparently intends to object to the document requests after being ordered by this Court to produce such
 documents, Plaintiffs nonetheless attach hereto (as Ex. 1) their First Document Request Pursuant to their Motion for
 Expedited Discovery.

D. Syngenta Does Not Oppose Plaintiffs' Alternative Request that the Case Management Conference be Rescheduled to an Earlier Date

The Case Management Conference is scheduled for September 18, 2008, which means the earliest discovery may commence under the Federal Rules is August 28, 2008. But since Syngenta's motion to dismiss will be heard 7 weeks earlier than previously scheduled, the parties will be fully prepared to discuss the case schedule earlier than September 18 and it makes sense to reschedule the Case Management Conference so that discovery can commence earlier than August 28. Syngenta has not opposed this suggestion, so Plaintiffs respectfully request that, if the Court does not find "good cause" to grant Plaintiffs' motion for expedited discovery, it reschedule the Case Management Conference.

V. CONCLUSION

For all the foregoing reasons, Plaintiffs' motion should be granted, or in the alternative, the Case Management Conference should be rescheduled to an earlier date convenient for the Court.

DATED: June 23, 2008

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Exhibit 1

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(SAN FRANCISCO DIVISION)

VALENT U.S.A. CORPORATION
and SUMITOMO CHEMICAL CO., LTD.,

Plaintiffs,

v.

SYNGENTA CROP PROTECTION, INC.,

Defendant.

CASE NO. 08-CV-0720 VRW

**EXHIBIT 1 TO PLAINTIFFS'
REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
EXPEDITED DISCOVERY**

**PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
SERVED PURSUANT TO THEIR MOTION FOR EXPEDITED DISCOVERY**

Plaintiffs Valent U.S.A. Corporation and Sumitomo Chemical Co. Ltd. ("Plaintiffs"), hereby serve their First Set of Requests For Production of Documents on Defendant Syngenta Crop Protection Inc. ("Syngenta Crop Protection").

Any documents responsive to the requests are to be produced or made available for inspection and copying at the offices of Dickstein Shapiro LLP, 1825 Eye Street, N.W., Washington, D.C., 20006, within thirty (30) days, after the service hereof. These requests are

1 continuing in nature and require supplemental production in accordance with Federal Rule of
2 Civil Procedure 26(e). The following definitions and instructions apply.

3
4 **DEFINITIONS**

5 A. The term “possession, custody, and control” means any document or thing either
6 in the direct legal possession of Syngenta Crop Protection (as defined below) or anything as to
7 which Syngenta Crop Protection has a current legal right under any applicable law to request,
8 receive, demand, review, observe, or otherwise obtain regardless of in whose possession said
9 document or thing currently resides.

10 B. “The ’469 Patent” means United States Patent No. 7,105,469, issued September
11 12, 2006, entitled “Use of Neonicotinoids in Pest Control.”

12 C. The term “patent-in-suit” refers to the ’469 Patent.

13 D. The term “the Complaint” means the “Complaint for Declaratory Judgment of
14 Patent Invalidity and Non Infringement” filed with the United States District Court, Northern
15 District of California on January 31, 2008.

16 E. “Defendant,” “Syngenta Crop Protection,” “you,” or “your” means Syngenta
17 Crop Protection, and any present or former parent, holding company, predecessor, subsidiary,
18 affiliate, division, subdivision, branch, partner, joint venturer, including any past or present
19 director, officer, employee, representative, managing agent, attorney, accountant, agent, or
20 consultant thereof.

21 F. “SCC” means Sumitomo Chemical Co. Ltd., and any present or former parent,
22 holding company, predecessor, subsidiary, affiliate, division, subdivision, branch, partner, joint
23 venturer, including any past or present director, officer, employee, representative, managing
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1 agent, attorney, accountant, agent, or consultant thereof.

2 G. "Valent" means Valent U.S.A. Corporation, and any present or former parent,
3 holding company, predecessor, subsidiary, affiliate, division, subdivision, branch, partner, joint
4 venturer, including any past or present director, officer, employee, representative, managing
5 agent, attorney, accountant, agent, or consultant thereof.

6 H. "Bayer" means Bayer AG, and any present or former parent, holding company,
7 predecessor, subsidiary, affiliate, division, subdivision, branch, partner, joint venturer, including
8 any past or present director, officer, employee, representative, managing agent, attorney,
9 accountant, agent, or consultant thereof.

10 I. The term "defendant" means any party named as a defendant in the above-
11 captioned case, or any predecessor or related company of any such party.

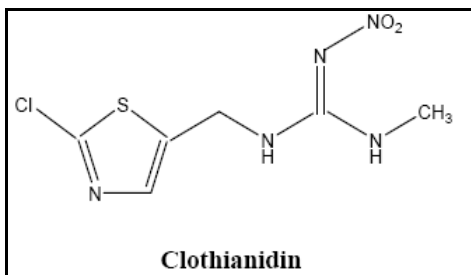
12 J. The term "document" is defined to be synonymous in meaning and equal in scope
13 to the usage of the term "documents" in FEDERAL RULE OF CIVIL PROCEDURE 34 (a) and
14 include(s) the term "writing". Unless the producing party demonstrates undue burden or other
15 grounds sufficient to meet the requirements of FEDERAL RULE OF CIVIL PROCEDURE 26(c),
16 electronic mail and any other electronically stored data is included within the definition of the
17 term "document." The terms "writings", "recordings", and "photographs" are defined to be
18 synonymous in meaning and equal in scope to the usage of those terms in FEDERAL RULE OF
19 EVIDENCE 1001. A draft or non-identical copy is a separate document within the meaning of the
20 term "document."

21 K. The terms "communication" or "communications" shall mean any transmission of
22 information by one or more persons and/or between two or more persons by any means,
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1 including telephone conversations, letters, telegrams, teletypes, telexes, telecopies, electronic
2 mail, other computer linkups, written memoranda, and face-to-face conversations.

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4 L. The terms “and”, “or”, and “and/or” as used in a particular discovery request shall
5 be construed either disjunctively or conjunctively as necessary to bring within the scope of the
6 discovery request any document, thing, and other information that might otherwise be construed
7 to be outside the scope of such request.

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9 M. “Clothianidin” is the chemical compound known as (*E*)-1-(2-chloro-1,3-thiazol-5-
10 ylmethyl)-3-methyl-2-nitroguanidine, and can also be referred to as 1-(2-chloro-5-
11 thiazolylmethyl)-3-methyl-2-nitroguanidine. The chemical formula for clothianidin is
12 $C_6H_8ClN_5O_2S$, the atomic weight is approximately 250 g/mol, and the chemical structure is
13 shown below:



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19 N. The term “product” means any article that contains clothianidin or has been
20 treated with clothianidin (*e.g.*, seeds).

21
22 O. The term “prior art” means any prior reference pursuant to 35 U.S.C. §§ 102 or
23 103, including without limitation, any invention, patent, patent application, publication, sale,
24 offer for sale or public use, relating to the subject matter of the patent-in-suit, which has or may
25 have an effective date of September 12, 2006, or earlier.

26
27 P. To the extent not otherwise defined herein, all terms shall be defined

1 synonymously with (1) their use in the Complaint, if used therein, or (2) their standard usage and
2 understanding by people schooled in the relevant art, or members of the relevant technical
3 community, or (3) their standard usage in common speech.
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5 **INSTRUCTIONS**

6 A. Consistent with Federal Rule of Civil Procedure 26(e), these requests for
7 production of documents are continuing in nature, and responsive documents that you obtain or
8 discover after your initial response and production must be produced.
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10 B. Where documents in your possession, custody or control are requested, the
11 request extends to documents in the possession, custody or control of your agents,
12 representatives and, unless privileged, attorneys. In responding to these requests for production
13 you have a duty to make a diligent inquiry and investigation of all persons, places and entities
14 that might have documents responsive to these requests, and from whom Syngenta Crop
15 Protection can obtain those documents without legal process.
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17 C. If you are aware of any documents that are responsive to these requests that (a)
18 are in the possession, custody or control of another; and (b) which you are not producing because
19 you contend that those documents are not within Syngenta Crop Protection's possession, custody
20 or control, then you must specifically identify the documents that are not being produced, and
21 including the identity of the person or entity in whose possession, custody or control Syngenta
22 Crop Protection contends those documents to be.
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24 D. If you contend that you are entitled to withhold from production the whole or any
25 part of any responsive documents on the basis of the attorney-client privilege, the work product
26 doctrine, or other ground, for each such document you are to provide sufficient information to
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1 permit Plaintiffs to fairly evaluate your claim of privilege, including but not limited to:

- 2 1. the nature of the document (*e.g.*, letter, memorandum, electronic mail, *etc.*);
- 3 2. the date of the document;
- 4 3. the sender, author, and all recipients of the document;
- 5 4. the subject matter of the document;
- 6 5. the number of pages of the document; and
- 7 6. the basis on which you contend you are entitled to withhold the document from production.

8 E. If an objection is made to any request herein, all documents covered by the
9 request not subject to the objection should be produced. Similarly, if an objection is made to
10 production of a document, the portion(s) of that document not subject to objection should be
11 produced with the portion(s) objected to clearly redacted.

12 F. If you contend that any request for production is ambiguous, unclear, or otherwise
13 incapable of response, in whole or in part, state with specificity the portion of the request for
14 production as to which you so contend, the basis of your contention, and produce documents
15 responsive to any portion of the request for production as to which your contention does not
16 apply. Where a request for production that you contend is incapable of answer due to ambiguity,
17 error or otherwise, can be rendered answerable by inductive or deductive reasoning of the
18 information, documents sought, identify the inductive or deductive reasoning applied, and
19 produce documents responsive to the request for production as amended. SCC reserves the right
20 to clarify or correct any ambiguities and/or typographical answers identified by you as a reason
21 for not responding or producing, and you must supplement any production that was incomplete
22 due to the issues clarified or corrected.

23 G. The singular form of a word should be interpreted in the plural as well. Any
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1 pronoun shall be construed to refer to the masculine, feminine, or neutral gender as in each case
2 is most appropriate.
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DOCUMENT REQUESTS

REQUEST NO. 1: Documents related to the development of the inventions claimed in the ‘469 patent (*e.g.*, lab notebooks, documents related to the “synergistic effect” described in the specification, etc.).

REQUEST NO. 2: Documents related to Syngenta’s use of clothianidin on genetically engineered and non-genetically engineered plants or their seeds, including data on all working examples described in the ‘469 patent.

REQUEST NO. 3: Any license agreements involving the ‘469 patent including the alleged license agreement with Bayer .

* * *

DATED: June 23, 2008

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